

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

RICK HARGRAVE)	CV 05-42-M-DWM
)	
Petitioner,)	
)	ORDER
vs.)	
)	
MIKE MAHONEY,)	
)	
Respondent.)	
<hr/>)	

On May 3, 2005, United States Magistrate Judge Leif B. Erickson entered Findings and Recommendation on this matter. Petitioner did not timely object and has so waived the right to *de novo* review of the record. 28 U.S.C. § 636(b)(1). This Court will review the Findings and Recommendation for clear error. *McDonnell Douglas Corp., v. Commodore Bus. Mach., Inc.* 656 f. 2d 1309, 1313 (9th Cir. 1981). Clear error exists if the Court is left with a "definite and firm conviction that a mistake has been committed." *United States v. Syrax*, 235 F.3d 422, 427 (9th Cir. 2000).

Petitioner at the time of filing this petition was a state prisoner proceeding *pro se*. He filed this action pursuant to 28 U.S.C. § 2254, but the petition is denied because the alleged violations of the Eighth Amendment in regard to time served under a suspended sentence are without merit.

There is no "clear error" found in the decisions by the district court or the Montana Supreme Court in their application of Mont. Code Ann. §§ 61-8-731(4) and (5) (1997) and Mont. Code Ann. §§ 46-23-1013(2) (1997). Petitioner's sentencing does not run counter to the Eighth Amendment's prohibition on cruel and unusual punishment when a court revokes a suspended sentence and declines to credit time elapsed during probation to time served. *Hall v. Bostic*, 529 F.2d 990, 992 (4th Cir. 1975) (citing *Thomas v. United States*, 327 F.2d 795, 797 (10th Cir. 1964)). Additionally, Petitioner is unable to establish that his original sentence has been enlarged because the probationary period is not counted as a part of the time of imprisonment. *Id.* Viewing the state court decisions in a highly deferential light, see 28 U.S.C. § 2254(d), Petitioner fails to state a claim for which federal habeas corpus relief may be granted.

Based on the foregoing reasons, this Court adopts Judge Erickson's Findings and Recommendation in full.

Accordingly, **IT IS HEREBY ORDERED:**

Petitioner's Writ of Habeas Corpus is **DENIED**.

DATED this 8th day of June, 2006.

/s/ Donald W. Molloy
Donald W. Molloy, Chief Judge
United States District Court